

130. An exchange traded security comprising:

a portfolio comprising of a group of securities that are within a substantially similar industry and satisfying market capitalization, the securities within the portfolio being weighted and the portfolio being changeable in response to a change in the identified group, wherein the portfolio has outstanding shares that are capable of being listed and traded on an exchange at a real time determined price highly correlating to securities within the portfolio, and wherein the exchange traded security is not a closed end fund.

131. The exchange traded security of claim 130 wherein a composition of the securities of the portfolio is actively managed.

132. The exchange traded security of claim 130 further comprising a derivative having a price correlating to the real time determined price of the fund, the derivative being capable of being listed and traded on the exchange.

133. The exchange traded security of claim 130 wherein the fund generates at least an end of the day net asset value, and wherein the net asset value and the price are highly correlating.

134. The exchange traded security of claim 130 wherein the group of securities comprising the group is substantially constant. --

REMARKS

Claims 53 and 75-89 are pending in this application. By this Preliminary Amendment, Applicants' have canceled claims 53 and 75-89, and added new claims 90-134. No new matter has been added by the above amendments.

Applicants specifically point out that the above amendments are NOT in response to a rejection of any or all claims by the Patent and Trademark Office. New claims 90-134 have been added in a good faith effort to expedite the prosecution of this application. Additionally, Applicants have submitted an Information Disclosure Statement.

Applicants enclose with this Preliminary Amendment a fee calculation sheet along with a check for the amount due. The Commissioner is hereby authorized to charge payment of any deficiency in these fees to Deposit Account No. 23-0280.

Official Action Issued Prior to Filing the Pending CPA

Prior to filing the current continuing prosecution application on December 30, 2002, Applicants received an Office Action dated July 3, 2002.¹ In the Office Action the Examiner rejected claims 53, 75-76, 78-81 and 83-84 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,812,987 issued to Luskin ("Luskin"). The Examiner also rejected claims 77 and 82 under 35 U.S.C. §103(a) as being unpatentable over Luskin in view of U.S. Patent No. 5,557,517 issued to Daughterty ("Daughterty"). Finally, claims 85-89 were rejected under 35 U.S.C. 102(b) as anticipated by Luskin. Applicants respectfully traverse these rejections.

First, Luskin is not a proper 35 U.S.C. §102(b) reference. Applicants' pending application claims priority from a parent application filed during the pendency of Luskin. Accordingly, Luskin is not "patented or described in a printed publication in this or a foreign country. . . more than one year prior to the date of the application for patent in the United States." As such, if Luskin were to be considered a prior art reference it would not be a 102(b) reference. Rather, if it is a prior art reference it could only provisionally be considered a 35 U.S.C. §102(e) reference.

Second, Applicants respectfully disagree that Luskin discloses or renders obvious each of the elements recited by the rejected claims under §§102 and 103. Applicants also disagree that the combination of Luskin and Daughterty suggested by Examiner under §103 is proper, and moreover, even if it is proper, Applicants submit that the combination does not render the claims unpatentable under §103 because they do not disclose all of the recited elements.

However, Applicants need not reach those issues at present. Luskin is a continuation-in-part (C-I-P) application. A C-I-P application is different from an original patent application in that it

^{1/} Applicants filed the present CPA application on December 30, 2002. Therewith, Applicants filed a request for a 3 month suspension of action under 37 CFR 1.103(b) to allow the Applicants to file an IDS and preliminary amendment. On February 13, 2003, prior to the end of the suspension of time, the Examiner erroneously entered an Office Action. The Applicants contacted the Examiner on February 20, 2003 and requested the Examiner withdraw the erroneous Office Action. In response, the Examiner stated that he would issue a supplemental Office Action following receipt of the IDS and preliminary amendment, and that the supplemental Office Action would statutorily operate to withdraw the February 13, 2003 Office Action. This is noted in the February 24, 2003 interview summary record.

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Title: "Open End Mutual Fund Securitization Process"
Inventors: Kenneth Kiron and Kevin S. Bander
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generates two effective filing dates applicable to different parts of the same patent. *Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1438 (Fed. Cir. 1984). New matter in a C-I-P application has the filing date of *the* C-I-P application, and not of the earlier filing date of the parent application. *Id.* Here, the disclosure of Luskin utilized by the Examiner in the rejections is disclosure that was added in the C-I-P application, and therefore has a filing date of March 13, 1995. Applicants have submitted herewith a Declaration of Prior Invention in the United States to Overcome the Cited Patent Pursuant to 37 CFR 1.131. In Applicants' 1.131 Declaration, Applicants establish completion, in the United States, of the subject matter of all claims pending in this application at a date prior to March 13, 1995. Accordingly, Luskin is not prior art to this application. As such, Applicants respectfully request reconsideration of each of the present §§ 102 and 103 rejections.

Conclusion

It is submitted that the currently pending claims are in condition for allowance. Should the Examiner having any issues or concerns, the undersigned respectfully requests a telephonic or personal interview.

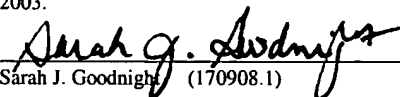
Respectfully submitted,

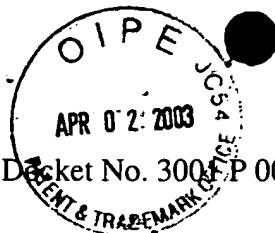
Dated: March 28, 2003

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CERTIFICATE OF MAILING

I hereby certify that this correspondence is, on the date shown below, being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: BOX FEE AMENDMENT, Commissioner of Patents, Washington, D.C. 20231 on March 28, 2003.


Sarah J. Goodnight (170908.1)



Attorney Docket No. 3004P 009

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of Kenneth Kiron et al.)
Application No. 09/579,801) Examiner: Dr. Geoffrey Akers, P.E.
CPA Filing Date: December 30, 2002) Group Art Unit: 3624
For: "Open End Mutual Fund Securitization)
Process")

**DECLARATION OF PRIOR INVENTION IN THE UNITED STATES
TO OVERCOME CITED PATENT PURSUANT TO 37 C.F.R. 1.131**

BOX FEE AMENDMENT
Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

As a below named inventor, I hereby declare that:

1. Kenneth Kiron and Kevin Bander are the inventors of the subject matter described and claimed in the above-identified patent application.
2. This declaration is to establish completion of the invention in this application in the United States, at a date prior to March 13, 1995, the effective date of the relevant subject matter of U.S. Patent No. 5,812,987, which was cited by the Examiner in the Office Action dated June 3, 2002. Transmitted herewith is a Preliminary Amendment in the above-identified Application.
3. This declaration is submitted prior to final rejection, and as such is timely. Accordingly, Applicants respectfully request the Examiner to enter this evidence into the record.

FACTS AND DOCUMENTARY EVIDENCE

4. To establish a date of completion of the invention of this application prior to March 13, 1995, the attached flowchart in Exhibit A are submitted as evidence. Applicants respectfully note that these documents are not presently being relied upon for establishing the earliest date of conception and/or reduction to practice of the invention of such one or more pending claims, but are solely being used to establish that Applicants date of conception and/or reduction to practice of the invention was prior to March 13, 1995.

5. Exhibit A hereto comprises a flowchart (Drawing Nos. MX 011900) displaying a definite and permanent idea of the complete and operative invention within the scope of the pending claims in the above-identified patent application. The flowchart closely resembles Figure 2 of the present application.
6. We have reviewed the documents comprising Exhibit A and find that this document represents what we believe to be a true copy of the original records generated contemporaneously with our research and development of the invention coinciding with the claims of the above-identified application. These documents support that there was a conception of the invention of the claims in the above-identified application of at least as early as 1993, which is a date earlier than March 13, 1995, the effective date of the relevant subject matter of U.S. Patent No. 5,812,987.

DILIGENCE

7. From the time prior to the date of the reference, 1993, continuously up to October 12, 1995, the date of filing of the patent upon which the above-identified patent application claims priority (U.S. Patent No 5,806,048), Applicants were diligent in reducing the invention to practice.
8. From the time prior to the date of the reference, 1993, to at least October 12, 1995 Applicants continuously and diligently performed research and design on the invention of the above-identified patent application.
9. During its research and design efforts, Applicants provided a confidential disclosure of their invention to the American Stock Exchange on October 12, 1994.

DECLARATION

10. As a person signing below:

I hereby certify that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

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SIGNATURES

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Inventor's Signature: 

CERTIFICATE OF MAILING (37 C.F.R. § 1.8a)

I hereby certify that this correspondence is, on the date shown below, being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to:
Box Fee Amendment, Assistant Commissioner For Patents,
Washington, D.C. 20231 on MARCH 28, 2003.


Sarah J. Goodnight (171195)